Filed 11/30/16 Kemper v. Mandekic CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| LINDA KERKORIAN KEMPER,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ANTHONY MANDEKIC,<br><br>Defendant and Respondent. | B272290<br><br>(Los Angeles County Super. Ct. No. BP171437) |

APPEAL from an order of the Superior Court of Los Angeles County. Brenda Penny, Judge. Affirmed.

Greenberg Traurig, Eric V. Rowen, and Scott D. Bertzyk for Plaintiff and Appellant.

Glaser Weil Fink Howard Avchen & Shapiro, Miriam J. Golbert and Elizabeth Chilton for Defendant and Respondent.

Linda Kerkorian Kemper (Kemper) appeals from an order denying her safe harbor application filed under former Probate Code[1] section 21320. Kemper sought the application to obtain a declaration that she could intervene in her half-sibling's will contest that challenged distributions under their father, Kirk Kerkorian's will, without violating the "no contest" clause in Mr. Kerkorian's 1997 trust that named Kemper as one of the beneficiaries. The probate court denied Kemper's safe harbor application on the ground of mootness because, by the time of the hearing on the application, the court in the Estate Proceeding had dismissed the will contest with prejudice pursuant to a settlement agreement. As we shall explain, the court properly denied Kemper's safe harbor application. The law does not authorize a safe harbor application in this case; section 21320 was repealed in 2010 and thus, a safe harbor application—the procedural mechanism formerly available to obtain declarations on the enforceability of no contest clauses in wills, trusts, and other instruments—no longer exists under California law. Accordingly, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1997, Kirk Kerkorian (Kerkorian) created a trust naming his daughters, Kemper and Tracy Kerkorian as the sole beneficiaries (the 1997 Trust). The 1997 Trust, which was made irrevocable upon its creation, contained a no contest clause providing that Kemper would forfeit her benefits under the 1997 Trust if she sought to challenge the validity of Kerkorian's will.

---

[1] All statutory references are to the Probate Code unless otherwise indicated.

After Kerkorian passed away in mid-June 2015, Kerkorian's 2013 will[2] was admitted to probate (the Estate Proceeding). Thereafter, on November 23, 2015, Kemper's half-sibling Kira Kerkorian (Kira) (through a court-appointed guardian ad litem)[3] filed a petition in the Estate Proceeding to revoke and contest the will, alleging that: (1) Kerkorian lacked testamentary capacity; (2) the 2013 will was not executed in the manner and form required by law; and (3) Kerkorian was subjected to undue influence.

Shortly thereafter, in December 2016, Kira's guardian and the executor of the estate, respondent Anthony Mandekic, reached a settlement and filed a petition in the Estate Proceeding to approve the settlement agreement and mutual release (the Settlement Petition) and to dismiss the will contest. On February 18, 2016, Kemper appeared at the initial hearing on the Settlement Petition and was granted a brief continuance until February 22, 2016, so that she could file a motion to intervene in Kira's will contest.[4] Rather than file a motion to intervene in the Estate Proceeding, on February 26, 2016, Kemper filed a safe harbor application to obtain a declaration that her intervention in the will contest would not violate the no contest clause in the 1997 Trust.[5] The court

---

[2] The 2013 will named Kerkorian's lawyers, business acquaintances, the executor, and various charities as beneficiaries, but made no provisions for Kerkorian's children.

[3] At the time she filed her petition, Kira Kerkorian was 17 years old.

[4] The hearing continued again until March 1, 2016.

[5] Because the no contest clause was contained in a private trust agreement rather than the 2013 will submitted for probate in the Estate Proceeding, the probate court opened a new, separate proceeding with a new case number: "The Kerkorian Family Trust," Case No. BP171437 (the Trust Proceeding).

scheduled the hearing for Kemper's safe harbor application for April 2016.

On March 1, 2016, Kemper appeared at the continued hearing on the Settlement Petition and requested another continuance, which the court denied. The probate court entered an order approving the Settlement Petition and dismissing the will contest with prejudice.[6]

At the hearing on Kemper's safe harbor application on April 18, 2016, the court dismissed the application without prejudice on the grounds of mootness. The court concluded that it could not provide relief on the application because the will contest in which Kemper had sought to intervene had been dismissed.

Kemper timely appealed from the order denying her safe harbor application.[7] After the parties filed their appellate briefs, the First District, Division Four of the California Court of Appeal

---

[6] Kira also requested that the court continue the matter until after she turned 18 years old, so that she could hire her own counsel to assess the settlement agreement. The court denied the request, concluding that the settlement served Kira's interest. On April 27, 2016, Kira filed a notice of appeal challenging the order approving the settlement and dismissing the will contest (Case No. B271828), but in August 2016, she filed an "Abandonment of Appeal."

[7] Kemper asserted, among other arguments, that her safe harbor application was not moot on April 18, 2016 because (1) she could have appealed from the order in the will contest approving the settlement agreement and dismissing the action; and (2) she could have also objected in the Estate Proceeding to the distribution of the estate. Respondent replied that the court properly denied the safe harbor application on mootness grounds because Kemper, having never actually intervened in the Estate Proceeding or will contest, could not (and did not) appeal from the order approving the settlement and dismissing the will contest, or object to the distribution of the estate.

decided *Funsten v. Wells Fargo Bank, N.A.* (2016) 2 Cal.App.5th 959, 974-977 in which the court held that the appellant's safe harbor application was subject to dismissal because the Legislature had repealed section 21320 which authorized the safe harbor applications. Kemper and respondent filed supplemental briefs[8] on the application of *Funsten* to this case, and specifically on the issue of whether a litigant, like Kemper, can seek a safe harbor application after the repeal of section 21320, if the trust instrument containing the no contest clause became irrevocable before January 1, 2001.

**DISCUSSION**

Respondent contends that the court properly dismissed Kemper's safe harbor application without reaching the merits. We agree, not for the reason cited by the probate court,[9] but instead because, as the court properly concluded in *Funsten*, a safe harbor application is no longer authorized even for those trust instruments that became irrevocable before 2001.

---

[8] Respondent also filed a motion for judicial notice requesting that this court take judicial notice of the legislative history of the amendments to the Probate Code sections concerning the enforceability of no contest clauses, and the repeal of section 21320. We grant the motion. (See e.g., Evid. Code, § 452, subd. (c); *In re Reeves (*2005) 34 Cal.4th 765, 777 [legislative history is the proper subject of judicial notice].)

[9] An appellate court reviews results not reasons. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138 [it is a "settled principle of appellate review that a correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasoning"]; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

A. *Kemper Was Not Entitled to a Ruling on the Merits of Her 2016 Safe Harbor Application.*

In 2005, the Legislature directed the Law Review Commission to conduct a comprehensive study on the then existing Probate Code provisions section 21310 to 21322 governing no contest clauses[10] in wills, trusts, and other instruments. At the time, the Probate Code provided that no contest clauses were valid and enforceable, subject to some specific exemptions and multiple exceptions. (See *Donkin v. Donkin* (2013) 58 Cal.4th 412, 422-427 [examining the history of no contest clauses in California].) The existing law, specifically section 21320 also allowed a beneficiary under an instrument to apply to the court for a declaration on whether a particular motion, petition or action would be a contest within the terms of a no contest clause.

In the Law Revision Commission's 2008 report, the Commission reported that the existing law governing no contest clauses was complex and uncertain in its operation, leading to an overreliance on the safe harbor procedure, which was viewed as time-consuming, expensive and burdensome on the courts. The Commission's report identified the expense and delay associated with the safe harbor application proceeding as one of the most common and serious problems with no contest clauses. The Commission recommended that the then-existing no contest statutes be simplified and clarified, and that the scope of the (now-former) section 21320 declaratory relief procedure be narrowed. (See *Donkin v. Donkin*, *supra*, 58 Cal.4th at pp. 422-427.)

---

[10] A no contest clause in an instrument "essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument." (*Burch v. George* (1994) 7 Cal.4th 246, 265.)

The original proposed version of the amendments to the no contest statutory scheme contained the narrow safe harbor application procedure suggested by the Law Review Commission. Nonetheless, the California Judges Association, the State Bar Trusts and Estates Section and the Judicial Council all urged the total elimination of the safe harbor application procedure as a means to save time and costs for the court and litigants. The Legislature responded with the enactment of an entirely new statutory scheme governing no contest clauses, effective January 1, 2010 (sections 21310-21315, referred to in the sections below as the "new law");[11] and it also entirely abolished section 21320. Consequently, section 21320, the procedure Kemper relied on to seek a declaration regarding the no contest clause in the 1997 Trust no longer exists; and it was not replaced with any new law authorizing a safe harbor procedure. (*Donkin v. Donkin*, *supra*, 58 Cal.4th at p. 427.) The court, therefore, did not err in dismissing Kemper's application without reaching the merits.

Nonetheless, Kemper, like the appellant in *Funsten*, argues that her situation is governed by the former section 21320, notwithstanding its repeal, because section 21315 provides that the new law only applies to instruments that became irrevocable after January 1, 2001.[12] And that the old law, including the former

---

[11] The new law generally limits the enforceability of no-contest clauses to (1) direct contests brought without probable cause; (2) challenges to the transferor's ownership of property at the time of the transfer, if expressly included in the no-contest clause; and (3) creditor claims and actions based on them, if expressly included in the no-contest clause. (See Prob. Code, § 21311; *Johnson v. Greenelsh* (2015) 47 Cal.4th 598, 601; *Fazzi v. Klein* (2010) 190 Cal.App.4th 1280, 1283.)

[12] Section 21315 provides: "(a) This part applies to any instrument, whenever executed, that became irrevocable on or after

section 21320, still applies because 1997 Trust became irrevocable in 1997. We disagree.

Kemper's argument assumes that because section 21315 provides that the former substantive law applies to the 1997 Trust, section 21315 also establishes that the section 21320 safe harbor procedure is still available. Section 21315, however, addresses the question of what substantive law applies to the interpretation of an *instrument*. As *Funsten* properly held, a safe harbor application is not an instrument; it is a pleading (i.e., a procedural device seeking a declaration). (*Funsten v. Wells Fargo Bank, N.A.*, *supra*, 2 Cal.App.5th at p. 975.) Because Kemper's application is not an "instrument," section 21315 is inapposite.

This interpretation of section 21315 finds support in *Donkin,* in which the Supreme Court examined the viability of a safe harbor application filed before the repeal of section 21320 that was still pending after the operative date of the new law. To determine the issue, *Donkin* did not apply section 20315 or characterize a safe harbor application as an "instrument." Rather, the *Donkin* Court looked to section 3 of the Probate Code, the general statute guiding the retroactive application of the changes to the Probate Code. (*Rice v. Clark* (2002) 28 Cal.4th 89, 99 ["The manifest purpose" of section 3 is "to make legislative improvements in probate law applicable on their operative date whenever possible."].) Section 3, subdivision (c), provides in pertinent part: "a new law applies on the operative date to all *matters* governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, . . . commencement of a proceeding, . . . or taking of an action."

---

January 1, 2001; [¶] (b) This part does not apply to an instrument that became irrevocable before January 1, 2001." (Prob. Code, § 21315.)

(Italics added.) In *Donkin* the Supreme Court characterized a safe harbor proceeding as a "matter" under section 3, concluding that because of section 21320's repeal, "[s]afe harbor proceedings are not . . . *matters* 'governed' by the current law. " (Italics added.) (*Donkin v. Donkin*, *supra*, 58 Cal.4th at p. 427.) The *Donkin* Court then turned to section 3, subdivision (g), which states that "[i]f the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law." The Supreme Court held that section 21320 governed in *Donkin* because appellant's safe harbor petition, filed in 2009, was a "matter" that occurred before the new law became operative, and was thus not subject to dismissal. (*Donkin v. Donkin*, *supra*, 58 Cal.4th at p. 427.)[13]

In accord with the Supreme Court's interpretation of section 3 in *Donkin*, subdivision (g), the old law applies to a "matter" if (1) the new law does not apply to that matter, and (2) that matter "occurred" before the operative date of the new law. (Accord, *Funsten v. Wells Fargo Bank, N.A.*, *supra*, 2 Cal.App.5th at p. 975.) Here, Kemper's safe harbor application met the first prong of subdivision (g) because the new no contest law does not apply to her safe harbor application. Her safe harbor application, however, did not "occur" before the operative date of the new law; she filed her

---

[13] Had the *Donkin* Court determined that a safe harbor application was an "instrument" under section 20315 (rather than a "matter" under section 3), then the beneficiary's safe harbor application would have been subject to dismissal. Indeed, the trust instrument in *Donkin* became irrevocable *after* 2001, and thus under section 20315, the new law applied to it. And because the new law does not provide for a safe harbor application procedure, the beneficiary in *Donkin* could not, therefore, have relied on section 21320 to obtain an advance ruling on the no contest clause.

application more than six years after the operative date of the current no contest law. Thus, section 3, subdivision (g) did not authorize the probate court to reach the merits of Kemper's safe harbor application in this case. *Funsten* properly reached the same conclusion on similar facts—where, as here, the trust became irrevocable before 2001, but the safe harbor application was not filed until years after the operative date of the new law. (*See Funsten v. Wells Fargo Bank, N.A.*, *supra*, 2 Cal.App.5th at pp. 974-976 [holding pleadings utilizing the section 21320 procedure not authorized after statute's repeal where trust became revocable in 1994 and safe harbor application filed in 2013].)

Consequently, the section 21320 declaratory relief procedure available under the old law is no longer available to prospective applicants like Kemper, regardless of whether old or new substantive law applies to interpretation and enforcement of the instrument. Our conclusion is supported by *Donkin* and legislative history. And it also achieves one of the principal purposes of the new law—the elimination of long and often costly litigation under section 21320. (*Donkin v. Donkin*, *supra*, 58 Cal.4th at pp. 424-426.)

### B. *No Other Basis Exists to Authorize a Safe Harbor Application After the Repeal of Section 21320*

None of the other arguments Kemper raises support her claim that safe harbor applications remain viable after the repeal of section 21320. First, Kemper argues that statutes—Code of Civil Procedure sections 366.2 and 366.3, providing that the statute of limitations is tolled during a safe harbor proceeding brought under former law, and Probate Code sections 1303 and 1304, providing that orders on safe harbor applications brought under former law are directly appealable—support her view that safe harbor applications survive the repeal of section 21320. These statutes do not in any way revive section 21320 where it would not otherwise

exist under section 3, subdivision (g). Given the legislative history discussed elsewhere here, in our view, sections 1303, 1304 and Code of Civil Procedure sections 366.2 and 366.3, were prompted by the Legislature's desire to allow safe harbor litigation—as in *Donkin*—already pending in January 2010 to be finished, rather than to reinvigorate section 21320 and thus invite a deluge of new safe harbor applications.

Second, Kemper claims that her interpretation of the Probate Code as allowing for safe harbor applications despite the repeal of section 21320 is supported both by the Law Review Commission commentary and legal treatises. The treatises and Commission comments, however, are not persuasive because they are all based on the assumption that a safe harbor application is an "instrument" under section 21315. As discussed elsewhere here, after *Donkin* and *Funsten*, we conclude that a safe harbor petition is a procedural matter, not an instrument. In any event, "[c]omments of the Law Revision Commission do not have the effect of law and are not binding on the courts." (*People v. San Nicolas* (1986) 185 Cal.App.3d 403, 407.) Likewise, legal treatises and practice guides do not have the force of law. (*Ammerman v. Callender* (2016) 245 Cal.App.4th 1058, 1085 [articles and treatises are not binding on the court].)

Finally, Kemper complains that it "makes no sense" to apply the old statutory scheme in the Probate Code to interpret a no contest instrument made irrevocable before January 1, 2001, and at the same time preclude a safe harbor application to test the meaning of the no contest clause in that instrument. We disagree. The new law eliminated only declaratory orders on the enforceability of no contest clauses; even without a safe harbor application procedure, a litigant may still litigate the application of a no contest clause.

In view of the foregoing, we conclude that the trial court did not err in denying Kemper's safe harbor petition.[14]

**DISPOSITION**

The order is affirmed. Respondent is entitled to his costs on appeal**.**

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

---

[14] In view of our conclusion we do not decide the merits of the parties' other arguments concerning the trial court's conclusion that Kemper's safe harbor petition was moot.